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June 17, 2005

VIA ELECTRONIC COMMENT FILING SYSTEM AND OVERNIGHT MAIL

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Request for Review of Decision of the Universal Service Administrator by Value-Added Communications, Inc.; USAC Audit Report No. CR2004FL008; CC Docket No. 96-45

Dear Secretary Dortch:

Value-Added Communications, Inc. ("VAC"), by its undersigned counsel and pursuant to section 54.719(c) and 54.721 of the Commission's Rules, 47 C.F.R. § 54.719(c) & 54.721, encloses for filing a Request for Review of Decision of the Universal Service Administrator ("Request for Review").

Pursuant to sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457 & 0.459, VAC requests that all of the information contained in Exhibit 1 to its Request for Review be treated as confidential and not subject to public inspection. This information has already been designated by the Universal Service Administrator as confidential and proprietary. Accordingly, we attach hereto a request for confidential treatment.

The proprietary version of the Exhibit is not included in the enclosed Request for Review and will be provided directly to the appropriate person within the Wireline Competition Bureau. All pages of the Exhibit for which VAC seeks to treat as proprietary are stamped "Confidential."

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Any questions regarding this filing should be addressed to the undersigned.

Respectfully submitted,

Wendy M. Creeden

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Counsel for VALUE-ADDED COMMUNICATIONS, INC.

Enclosures

cc: USAC, Internal Audit Division
Kermit Heaton (VAC)
Wayne E. Campbell

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JUN 2 0 2005

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Review of Decision of the Universal Service Administrator by	)	**USAC Audit Report No. CR2004FL008**
	)	
Value-Added Communications, Inc.	)	**CC Docket No. 96-45**

REQUEST TO WITHHOLD INFORMATION FROM PUBLIC INSPECTION

In accordance with section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, Value-Added Communications, Inc. ("VAC"), by its undersigned counsel, hereby requests that the material and information contained in Exhibit 1 to its above-captioned Request for Review of Decision of Universal Service Administrator ("Request for Review") be treated as proprietary and confidential information not available for public inspection. In support of this Request and in accordance with section 0.459(b) of the Commission's Rules, 47 C.F.R. § 0.459(b), VAC provides the following information:

1. Exhibit 1 to VAC's Request for Review is the Audit Report No. CR2004FL008 ("Audit Report") of the Universal Service Administrator ("USAC"). VAC seeks confidential treatment of this Audit Report, which contains VAC revenue information and an analysis by USAC of VAC's revenue and internal revenue reporting processes. This Audit Report has been designated by USAC as "Confidential and Proprietary."

2. VAC submitted confidential financial data and information regarding its internal revenue reporting processes to enable USAC to perform its audit. VAC now submits this Audit Report voluntarily in an effort to assist the Commission in reviewing a decision made by USAC during and at the conclusion of the audit.

3. The information contained in the Audit Report, as described in paragraph 1, above, is sensitive commercial and proprietary information protected pursuant to section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d). The information is also privileged pursuant to the same section as it pertains to VAC's financial operations and internal revenue reporting processes and, therefore, is not available to the public.

4. The information relates to telecommunications services VAC provides in competition with other service providers.

5. Disclosure of this information to the public would significantly harm VAC. It provides confidential information regarding a financial aspect of VAC's business, its revenues from its operator services, and its methods of accounting for, and reporting,

such revenues. Such information could be used inappropriately by VAC's competitors. More specifically, VAC competes in the inmate payphone industry where carriers compete to win contracts to provide service by submitting bids to correctional facilities. This bidding process is extremely competitive. Therefore, if sensitive commercial and proprietary information is made available to other carriers, it would enable those other carriers to misuse such information in the bidding process. As described below, public inspection is not necessary for the Commission to make a determination in this proceeding and, therefore, the confidential nature of this information should not be jeopardized.

6. VAC treats the information as confidential and proprietary and does not customarily disclose such information to competitors, customers, or internal and external personnel whose job performance does not require such information or who have not agreed to keep this information in confidence. As indicated by USAC, USAC has treated this audit as confidential and proprietary as well.

7. VAC treats this information as confidential and proprietary, has not disclosed this information publicly, does not customarily disclose this information to third parties except on a "need to know" basis.

8. The information should not be made available for public disclosure at any time. There is nothing material that public comment would add to the Commission's analysis of VAC's confidential data.

For the reasons discussed above, VAC respectfully requests that the Audit Report and the information contained therein, which is identified as confidential, be withheld from public inspection in accordance with section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459. The subject information qualifies as commercial, financial, and other information that would "customarily be guarded from competitors" pursuant to section 0.457(d)(2), 47 C.F.R. § 0.457(d)(2).

In the event the Commission denies confidential treatment of such information, pursuant to section 0.459(e), 47 C.F.R. § 0.459(e), VAC respectfully requests that the materials be returned to the undersigned counsel and not disclosed to the public.

Any questions regarding this request should be addressed to the undersigned.

Respectfully submitted,

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Before the
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REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY VALUE-ADDED COMMUNICATIONS, INC.

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Dated: June 17, 2005

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REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY VALUE-ADDED COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

On April 18, 2005, the Universal Service Administrative Company ("USAC") Audit Committee and Board of Directors approved the Value-Added Communications, Inc. ("VAC" or "Company") Audit Report issued by USAC's Internal Audit Division, USAC Audit Report No. CR2004FL008 ("USAC Audit Report," "Audit Report" or "Report").[1] Throughout USAC's audit process, VAC has maintained that it is entitled to a credit for universal service fund ("USF" or "Fund") payments made to its underlying carrier during the years covered by the audit. In its Audit Report, USAC claims that it is precluded from issuing a credit to VAC because USAC believes it is unable to verify that VAC's underlying carrier actually remitted the USF payments received from VAC.[2]

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1 *See* Exhibit 1 (USAC Audit Report). Please note that proprietary portions of the USAC Audit Report have been redacted from the attached copy of that Report. Simultaneous with the filing of this Request for Review, VAC is filing a Request to Withhold from Public Inspection the proprietary information contained in this Report.

2 *See id.* at 5.

Pursuant to sections 54.719(c) and 54.721 of the Commission's Rules,[3] and through its undersigned counsel, VAC requests Federal Communications Commission ("Commission" or "FCC") review of USAC's refusal to issue a credit to VAC for USF payments made to its underlying carrier. As explained below, the FCC should not allow double collection of USF payments. Not only is double collection unjust, it violates the *Communications Act of 1934, as amended*, ("Act") and the FCC's long-standing policy against double collection of USF contributions. Indeed, double collection is routinely avoided by the government and the courts and should be avoided by the FCC here as well. Instead, the FCC should require USAC to implement simple administrative procedures, as described below, in order to verify contribution and issue a credit for USF payments submitted through another carrier. VAC requests that the FCC adopt these procedures and remand its Audit Report to USAC for the processing of its USF payments in accordance with these procedures.[4]

VAC submits the following information in support of its Request for Review.

II. FACTUAL BACKGROUND

VAC provides an inmate telephone system to the Federal Bureau of Prisons ("FBOP") for use at numerous federal prison sites. As a part of this system, VAC

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[3] 47 C.F.R. §§54.719(c) & 54.721.

[4] TON Services Inc. ("TON") has an appeal pending before the FCC regarding a similar credit request for USF payments made to underlying provider. TON Services, Inc. Appeal of Universal Service Administrative Company's Administrator's Decision on Contributor Appeal, CC Docket No. 96-45 (filed Jan. 7, 2005). Instead of merely implementing the "preponderance of the evidence" standard as requested by TON, VAC urges the FCC to implement the administrative procedures described herein. It is VAC's understanding that there is one other appeal pending regarding a reseller credit request, although the majority of that filing was directed at other issues. *See* Appeal of Decisions of the Universal Service Administrative Company Concerning Eureka Broadband Corporation's Revisions to FCC From 499-A and Application of Charges, CC Docket Nos. 96-45 and 97-21 (filed Sept. 30, 2004).

provides interstate and intrastate collect and prepaid calling services for use by the inmates at prison sites.

For several years, based on assurance by the FBOP, VAC reasonably believed that the revenues from the FBOP's inmate telephone system were exempt from USF contributions as government revenue. As such, the underlying carrier for the FBOP's inmate telephone system, Sprint Corporation ("Sprint"), treated VAC as an end-user and assessed USF pass through charges on VAC. VAC paid in full to Sprint these USF pass though charges as they were invoiced to VAC.

After conducting an internal investigation regarding its USF obligations, VAC decided to contribute to universal service based on the interstate collect and prepaid calling services that VAC provides as part of the FBOP's inmate telephone system. In March 2003, VAC filed revised Forms 499-A for calendar years 2000 and 2001 revenues for this purpose.[5]

Because of the passage of time, VAC was, and continues to be, unable to obtain a refund directly from its underlying carrier for the USF payments that VAC submitted to that carrier during the time that VAC was treated as an end-user for USF recovery purposes. Indeed, there is no incentive for VAC's underlying carrier to issue a refund. Even if VAC's underlying carrier were to submit revised Form 499-A filings that move

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5 While VAC has decided to contribute to USF based on the interstate collect and prepaid calling services that VAC provides as part of the FBOP's inmate telephone, VAC nevertheless believes that it qualifies for the government-only exemption for USF contributions because VAC has provided interstate telecommunications services to only one customer, the FBOP, a government entity, since the beginning of 2001. *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776, ¶800 (1997) (subsequent history omitted) ("*Initial Universal Service Order*"); *see also* Instructions to the Telecommunications Reporting Worksheet, Form 499-A, April 2005, at 8. Accordingly, VAC is a permissive filer. VAC has filed, and continues to file, the appropriate forms for USF contributions on those revenues.

VAC's revenue out of Block 4 (the USF contribution base) and into Block 3 ("other contributor" revenue not included in the contribution base), USAC would not process these revised filings or issue the underlying carrier a refund because USAC will not accept downward revisions to 499-A filings beyond one year after the *initial deadline*. At one time this was merely a USAC policy, but this policy was recently adopted by the Wireline Competition Bureau.[6]

In April 2003, USAC's Internal Audit Division initiated an audit of VAC's Form 499-A filings for calendar years 2000 and 2001 revenues. Over the course of the next two years, VAC responded to numerous inquiries by USAC and USAC's outside auditor, Deloitte & Touche LLP ("D&T"). VAC provided both USAC and D&T with extensive information regarding VAC's 2000 and 2001 revenues and how those revenues were reported on its Form 499-A filings. Throughout the audit, VAC consistently maintained that the Company was entitled to an offset for USF contributions VAC made indirectly through its underlying carrier.

During the process of preparing responses to USAC's audit, it came to the attention of VAC that various inadvertent mistakes were made in the reporting of its 2000 and 2001 revenues on its Forms 499-A filings. Accordingly, VAC submitted corrected Form 499-A filings in October 2003 and January 2005. It is VAC's understanding that none of its revised Form 499-A filings (March 2003, October 2003 and January 2005) have been processed by USAC because, as part of these filings,

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[6] Federal-State Joint Board on Universal Service, et al., CC Docket Nos. 9645, 98-171 and 97-21, *Order*, FCC 04-3669, ¶¶10-14 (WCB Dec. 9, 2004) "(*WCB Revisions Order*"). Appeals of the Bureau's decision are pending before the Commission.

VAC sought a credit for the USF payments that the Company had already paid to its underlying carrier.

In October 2004, USAC's Internal Audit Division ("Division") finalized its Report regarding the audit of VAC's Form 499-A filings for calendar year 2000 and 2001 revenues. In that Report, the Division calculated the amount of USF contribution owed by VAC based on the corrected 2000 and 2001 revenue information provided in the audit process.[7] The Division, however, refused to allow for a credit of the USF payments that VAC has already submitted to its underlying carrier and indicated that VAC instead should obtain a refund from the carrier to whom payment was made.[8] USAC stated that the basis for the refusal of a credit for VAC's USF payments to its underlying carrier is as follows:

> For many reasons, it is difficult, if not impossible, for USAC to verify the precise extent of alleged double-payment situation and to determine whether an underlying carrier, in fact, reported and paid on a particular carrier's revenues without data carefully correlated by both carriers.[9]

In other words, USAC will not issue a credit to VAC for the USF payments that the Company has made to its underlying carrier because USAC believes that it is impossible for USAC to administratively verify that those payments were remitted to the USF by its underlying carrier.

The Division's Audit Report regarding VAC's Form 499-A filings for calendar year 2000 and 2001 revenues was approved by the USAC Audit Committee and Board of Directors at their quarterly meeting on April 18, 2005. With this filing, VAC seeks review by the Commission of USAC's refusal to issue a credit to VAC for USF payments made

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7 USAC Audit Report at 3.

8 *Id.* at 6.

to its underlying carrier. This Request for Review is timely filed within 60 days of the date the Audit Report was approved by the USAC Audit Committee and Board of Directors.[10]

III. ARGUMENT

USAC's attempt to recover USF contributions from VAC without providing any means of credit or refund for payments made by VAC to its underlying carrier is undeniably an attempt at double collection of USF. This result is simply not allowable. Congress and the Act do not permit it, and it violates the FCC's long-standing policy against inequitable burden of USF support. Furthermore, it is not consistent with the basic principle of law that the government is not entitled to double payment. Accordingly, the FCC should reverse USAC's determination and require USAC to process VAC's credit request using the simple administrative procedures described below.

A. Double Collection of USF Payments Violates the Act and the FCC's *Policy Against Inequitable and Discriminatory Burden of USF Support*

1. Congress' Mandate for Equitable and Non-Discriminatory USF Collections

Congress mandates that USF contributions must be collected in an equitable and non-discriminatory manner. Specifically, section 254(d) of the Act provides that,

> [e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on *an equitable and nondiscriminatory basis*, to the specific, predictable, and sufficient

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9 *Id.*

10 47 C.F.R. §54.720(a). Although VAC was not formally advised of the Board's action until after May 11, 2005, out of an abundance of caution, VAC files this appeal within 60 days of the date of the Board's action.

mechanisms established by the Commission to preserve and advance universal service.[11]

Courts have interpreted this provision to require that USF contributions be administered in a fair way that does not result in certain carriers being harmed more than others. For example, citing to Congress' equitable and non-discriminatory mandate, the Fifth Circuit ruled that carriers with large international revenues could not be required to contribute to USF on those revenues when their contributions would amount to more than their interstate revenues.[12] The Fifth Circuit concluded that such a practice was not "equitable or non-discriminatory," but instead improperly imposed prohibitive costs on those international carriers and "harmed them more that it harmed others" in violation of the Act.[13]

In a companion provision of the Act, section 254(f), Congress extended the "equitable and non-discriminatory" mandate for federal USF to state USF contributions.[14] This state companion provision includes the exact same "equitable and non-discriminatory " mandate as specified in section 254(d) for federal USF contributions.[15] Based on this "equitable and non-discriminatory" mandate, the Fifth Circuit ruled that states could not collect state USF contributions on interstate revenues because the FCC already collects federal USF based on those revenues.[16] Importantly, the Court concluded Congress' "equitable and non-discriminatory" mandate did not allow such a

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11 47 U.S.C. § 254(d) (emphasis added).

12 *Tex. Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 434-35 (5th Cir. 1999).

13 *Id.*

14 47 U.S.C. § 254(f).

15 Section 254(f) mandates that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on *an equitable and nondiscriminatory basis*, in a manner determined by the State to the preservation and advancement of universal service in that State." 47 U.S.C. § 254(f) (emphasis added).

16 *AT&T Corp. v. Pub. Util. Comm'n. of Tex.*, 373 F.3d 641, 646-647 (5th Cir. 2004).

double collection of USF from the government, and, thus, the state could only collect state USF based on intrastate revenues.[17] The Court ruled that the double collection of USF from multijurisdictional carriers impermissibly discriminated against them by placing them at a competitive disadvantage to carriers that provided interstate services only.[18]

2. FCC's Policy Against Double USF Collections

Likewise, based on Congress' "equitable and non-discriminatory" mandate specified in section 254(d) of the Act, the FCC has recognized that the mechanism for USF contribution needs to be structured in such a way so as to avoid double payment of USF by contributors.[19] In fact, since the inception of the Fund, the FCC has attempted to avoid double contribution to the USF. In its Initial Order implementing the USF, the FCC expressed concern regarding possible double payments and adopted the current end-user revenue contribution methodology primarily as an attempt to avoid double USF contribution.[20] In implementing an end-user revenue methodology, the FCC rejected other contribution methodologies in part because they would have required resellers to make double USF payments.[21]

The FCC sought to avoid double payments by resellers, and cited to the following as an example of a situation that should not be allowed to occur:

> For example, assuming a 10 percent contribution rate on gross revenues, if facilities-based carrier X sells $200.00 worth of telecommunications services directly to a customer, its contribution will be $20.00. If reseller

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17 *Id.*

18 *Id.* at 647.

19 *See Initial Universal Service Order at* ¶¶842-854; *see also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Order on Reconsideration*, FCC 04-237, ¶¶36-39 (rel. Nov. 29, 2004) ("*Universal Service Recon Order*"); Federal-State Joint Board on Universal Service, et al., *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24,952, ¶79 (2002) ("*Universal Service Methodology NPRM*").

20 *Initial Universal Service Order* at ¶¶843-854.

21 *Id.* at ¶¶845-847.

> B buys $180.00 worth of wholesale services from carrier A and B sells the same retail services in competition with X after adding $20.00 of value, B would owe a contribution of $20.00 on these $200 worth of services, but B would also be required to recover the portion of the $18.00 contribution that A must make and would likely pass on to B. Therefore, while X would face $200.00 in service costs and $20.00 in support costs, B would face $200.00 in service costs and almost certainly substantially more than $20.00 in support costs. Adding another reseller to the A-B chain would compound this problem.[22]

The Commission concluded that collection of USF payments in this manner would clearly place resellers at a competitive disadvantage to other carriers and, thus, should not be permitted.[23] As a result, the FCC decided to adopt an end-user revenue methodology in an attempt to avoid double payment of USF by resellers. The Commission, clearly concerned about the implications of double collection in light of the Act's mandate, viewed end-user revenue as a competitively-neutral contribution methodology that would "eliminate . . . the double payment problem" in the context of resellers.[24] Based in part on this goal and Congress' mandate for "equitable and non-discriminatory" collection of USF support, the FCC extended the end-user revenue methodology to other federal regulatory contributions.[25]

Underlying the Commission's intent to have the end-user revenue methodology avoid double contribution by resellers is an important directive -- that USF pass-through fees would be correctly assessed. As the Commission itself has recognized, when an incorrect pass-through assessment is made that results in an underlying provider

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22 *Id.* at ¶845.

23 *Id.* at ¶846.

24 *Id.*

25 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, *Report and Order*, 14 FCC Rcd. 16, 602, ¶¶55-70 (1999). Additionally, in its pending USF methodology proceeding, the FCC has specifically noted

receiving USF payment from a resale contributor, an impermissible "double burden" has been placed on the reseller.[26]

While of course it would be impossible for the FCC to ensure that all pass-though fees are correctly assessed (mistakes do happen), the end-user revenue methodology will inevitably fail to avoid double contribution because it lacks a means by which carriers can correct these inevitable mistakes. Without a method for proper accounting of USF payments made to underlying providers, the methodology does not meet Congress' mandate that the USF burden be allocated in an "equitable and non-discriminatory" manner. As it stands, without a method of correction, the system is structured in such a way that resellers contribute more than their equitable share and the government receives an impermissible windfall at the resellers' expense.[27] In lacking a method to account for USF payments submitted through underlying carriers, the current system inappropriately discriminates against resellers because it harms resellers more than it harms non-reseller carriers.[28] The inequitable and discriminatory result is precisely what Congress intended to eliminate when it adopted its "equitable and non-

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that any new or revised methodology adopted by the Commission must comply with Congress' mandate for equitable and non-discriminatory USF collections. *See Universal Service Methodology NPRM* at ¶73.

26 *Universal Service Recon Order* at ¶39.

27 *See, e.g.*, Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Robert A. Calaff, Senior Corporate Counsel, T-Mobile USA, Inc. and James H. Barker and William S. Carnell, Latham & Watkins, Counsel for Leap Wireless International, Inc., DA 03-2835, at 5 (Sept. 5, 2003).

28 *See Tex. Office of Pub. Util. Counsel*, 183 F.3d at 434-35. The problem for resellers is further exacerbated in that downward revisions to USF filings are prohibited more than one year beyond the initial filing deadline. *See WCB Revisions Order* at ¶¶10-15. Thus, even if a mistake were discovered and a clear instance of double collection was readily evident – and even if the underlying provider acknowledged the error and would otherwise be willing to cooperate with the reseller to remedy it – nothing would in fact be done if the double collection occurred more than one calendar year in the past, because the underlying provider would itself be unable to obtain a credit from USAC. This further demonstrates the inequitable impact that the current regime has on resellers and why a simple administrative process to address double collection issues would be of such significance.

discriminatory" mandate for USF contributions, and is exactly what Commission was trying to avoid when it adopted the end-user methodology.

Indeed, because there is no mechanism for the program to properly account for USF payments made to underlying carriers, Congress' fears about inequitable and discriminatory USF collections and the Commission's fears about double collection from resellers have come to fruition. In fact, VAC's situation is precisely the example to which the Commission cited as an undesirable result. Until there is a mechanism by which VAC may receive credit for the USF payments that VAC has already made through its underlying provider, double collection has undeniably occurred and the universal service system itself fails to comply with Congress' "equitable and non-discriminatory" mandate and the FCC's policy against double contribution.

B. Avoidance of Double Collection by the Government is a Well-Established Principle of Law

The goal of avoiding double collection is not unique or limited merely to the USF or the FCC. Rather, the avoidance of double collection by the government is a well-established principle of law that underlies many other government assessment programs.

For example, the Internal Revenue Service ("IRS"), which administers the federal excise tax, has a similar system to USF in which reseller carriers can provide resale certificates to underlying carriers to avoid the double collection problem.[29] In a situation in which the underlying carrier has erroneously collected the excise tax from a reseller carrier and remitted the tax with the IRS, the reseller carrier has the option (and the legal

[29] *See Generally, I.R.S. Publication 510, Excise Taxes for 2004,* (describing collection amounts and procedures for federal excise taxes).

standing) to directly seek from the IRS a refund of the tax collected by the underlying carrier.[30] In effect, this procedure allows a method for a reseller to recoup the tax erroneously paid to an underlying carrier and thus avoid double collection by the government.

In similar tax areas, the federal courts have repeatedly upheld refunds or offsets to one taxpayer when the tax has already been paid by another party, or when a party over-pays its taxes. For example, the Fifth Circuit ruled that taxpayers who overpaid taxes during the years 1960-1966 were entitled to a mitigation (*i.e.*, an offset or refund), notwithstanding the passage of time or any defense based on the running of the statute of limitations.[31] Similarly, the District Court for the Eastern District of Pennsylvania ordered a refund of amounts tendered by the employer but not withheld by it from its employees, because the U.S. Government had also collected these taxes from the employees and had received a double payment of the amount due.[32]

In another context, Congress prohibited another federal regulatory agency, the Environmental Protection Agency ("EPA"), from obtaining double payment from the public. Specifically, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), commonly referred to as "Superfund," provides legal authority for the EPA to seek payment for environmental pollution from land owners, both past and present.[33] As part of CERLCA, Congress clearly established that if an environmental clean-up has been completed and the government's response costs fully

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30 *Id.* at 5.

31 *Cocchiara and Roussel v. United States*, 779 F.2d 1108 (5th Cir. 1986).

32 *American Friends Services Committee v. United States*, 368 F. Supp. 1176, *rev'd on other grounds*, 419 U.S. 7 (1974).

reimbursed, the government is entitled to no further recovery from any responsible person.[34] In other words, similar to USF contributions, Congress has decided that the government is not entitled to double payment for environmental clean up costs. Significantly, the courts have repeatedly confirmed this prohibition against double collection by the EPA.[35]

In sum, the courts have found that it is wholly inequitable, discriminatory, and unfair for the government to collect twice for a government assessment such as USF. It clearly is not the case that government is, or should be, entitled to double collection, particularly when the double collection is most likely to occur at the expense of one particular kind or class of contributor. There is no exemption for USF from this well-established principle. In fact, Congress' mandate for an equitable and non-discriminatory collection of reinforces this general principle. Instead, as demonstrated in other contexts, it is a well-established principle of law that double collection by the government is not allowed. Accordingly, the FCC is obligated to establish the administrative procedures necessary to avoid double collection of USF payments.

C. The FCC Should Avoid Double USF Collection by Adopting Administrative Procedures for Double Payment Credits

While the FCC adopted the end-user revenue methodology in an effort to avoid double collection, without a process by which the government may properly account for USF payments already made through other providers, the Commission's efforts to avoid

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33 *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9628.

34 42 U.S.C. § 9613(f).

35 *See B.F. Goodrich Co. v. Murtha*, 855 F. Supp. 545, 546 (D. Conn. 1994) ("Settlements reduce non-settlers potential liability 'by the amount of the settlement.' No agency is entitled to more than full reimbursement."); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 677 (D.N.J. 1989) ("Congress

double payment are wholly ineffective. Not only has the Commission tasked resellers with determining whether they themselves should be direct contributors, it also has asked wholesale providers to determine the contribution status of their reseller customers.[36] In implementing these obligations, it is inevitable that mistakes will be made by carriers. By not providing a mechanism through which carriers can correct these mistakes, the Commission fails in its efforts to avoid the double collection problem.

Accordingly, in order to avoid the double collection problem, the Commission should direct USAC to implement administrative procedures that will allow for the proper accounting of USF payments already made through other providers. Although USAC is under the mistaken belief that it is "impossible" for USAC to implement administrative procedures that could verify whether such payments were remitted by the underlying carrier to the USF,[37] VAC submits that, in fact, there are simple administrative procedures that USAC could implement to verify, and therefore avoid, double recovery of USF payments by the government. These procedures would not be unduly burdensome for USAC, but instead would shift most of the administrative burden to the carriers involved.

Specifically, a contributor who seeks a credit for USF payments that it has submitted to an underlying carrier would be required to submit a written verified request for the credit to USAC. As part of the written request, the requesting contributor would be required to certify that it has appropriately reported on its Forms 499 the

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has plainly indicated that non-settling defendants' contribution claims will be barred, and they will be credited only with the amount of the settlement and nothing more.").

36 *See* Instructions to the Telecommunications Reporting Worksheet, Form 499-A, April 2005, at 17-18; *see also Universal Service Recon Order* at ¶39.

37 *See* USAC Audit Report at 5.

telecommunications services it purchases from its underlying carrier as part of its end-user revenue upon which USF has been, or will be assessed. The requesting contributor furthermore would be required to provide USAC with proof of the USF payments to the underlying carrier. Such documentation could include, for example, copies of the invoices and cancelled checks or bank statements showing the payment deductions.

Upon receipt of a credit request with this supporting documentation, USAC would then forward a copy of the request and supporting documentation to the underlying carrier and require the carrier to confirm that the USF payments submitted to the carrier by the requesting contributor were, in fact, remitted to the USF. For those years in which a mark-up of the USF recovery fee was allowed, the underlying carrier would be required to specify how much of the USF payment by the requesting contributor was remitted to the Fund. Since April 1, 2003, when mark-ups of USF recovery fees were banned, an underlying carrier who received USF payments from another carrier would merely verify that it remitted the full amount of the USF payment. Again, the burden would be on the underlying carrier, not USAC, to determine the amount of the payment from the requesting contributor that the underlying carrier remitted to the USF. Finally, USAC then would issue the appropriate credit to the requesting contributor based on the underlying provider's response.[38]

Notably, these procedures would merely be requiring carriers to confirm compliance with the Commission's Rules. A carrier who charges a USF recovery fee but does not report those revenues and/or contribute to USF on those revenues is in violation of the FCC's USF orders and truth-in-billing requirements.[39] Indeed, these procedures could serve as an extremely useful tool for USAC and the FCC in verifying compliance with USF payment obligations. USAC, the Commission and consumers would benefit from any information received as part of this process that indicates a carrier may not be remitting USF recovery payments to the Fund. Based on any such information, USAC and the FCC could then analyze whether any further investigation is warranted. Furthermore, implementation of these procedures would provide additional incentives for carriers, including both resellers and wholesale carriers, to ensure that they are in compliance with their USF obligations.

In sum, contrary to USAC's belief, there are simple administrative procedures that could be implemented to verify whether a credit is warranted to avoid double payment of USF contributions, and most of the verification burden for these procedures would not fall on USAC. As described above, carriers would be required to confirm compliance with their USF obligations, and the government would have a useful vehicle by which it could detect violations of the FCC's Rules.

IV. CONTACT INFORMATION

Please direct any questions regarding this Request for Review to the following:

Tamar E. Finn, Esq.
Kathleen Greenan Ramsey, Esq.
Wendy M. Creeden, Esq.

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[38] Situations of non-responsiveness from carriers could be forwarded to the FCC for any appropriate enforcement action.

[39] *See Federal-State Joint Board On Universal Service*, et al., *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952, ¶¶45-55 (2002); Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, CC Docket No. 98-17 and CG Docket No. 04-208, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, FCC 05-55, ¶¶8-10, ¶¶25-29 (rel. Mar. 18, 2005).

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V. CONCLUSION

Pursuant to Congress' "equitable and non-discriminatory" mandate, the cornerstone of the administration of USF is that double collection should be avoided. The FCC attempted to adhere to this mandate by adopting its current end-user revenue methodology. However, without a mechanism to provide credits in instances of double payments, Congress' mandate and the Commission's goal of avoiding double collection cannot be achieved. Instead, the Commission should adhere to the well-established principle of law against government double collection and adopt the necessary administrative procedures that would require USAC to make a proper accounting of USF payments already received by the government through underlying carriers. Contrary to USAC's belief, such procedures are entirely possible, and could be fashioned in such a way that most of the verification burden would be placed on the carriers involved.

For the foregoing reasons, the FCC should confirm that double recovery is not allowed under the USF program and direct USAC to process VAC's request for credit for the USF payments already submitted to its underlying carrier under the administrative procedures described in Section III.C., above.

Respectfully submitted,

Wendy M. Creeden

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Counsel for VALUE-ADDED COMMUNICATIONS, INC.

Dated: June 17, 2005

Exhibit 1

USAC Audit Report

<u>CONFIDENTIAL & PROPRIETARY</u>

USAC
Universal Service Administrative Company
Internal Audit Division
Wayne Scott
Vice President

May 11, 2005

RECEIVED MAY 1 3 2005 KDH

Value-Added Communications, Inc.
Attn: Kermit Heaton, EVP-Corp. Admin.
3801 E. Plano Parkway, Suite 100
Plano, Texas 75074

RE: Audit Report: CR2004FL008

Dear Mr. Heaton:

Value-Added Communications' audit report: CR2004FL008 was approved and finalized by the USAC Audit Committee and Board of Directors at the quarterly meeting held on April 18, 2005. Enclosed, please find a copy of the said audit report for your records and review.

Sincerely,

Wayne Scott

Wayne Scott
Vice President, Internal Audit Division

WS:vbg

Enclosure

Universal Service Administrative Company

PRIVILEGED & CONFIDENTIAL

To: Ms. Anne Marie Trew, Acting Head of Finance

From: Internal Audit Division

Date: October 7, 2004

Re: Contributor Revenue Financial / Follow-Up Audit Report – Value Added Communications, Inc. (USAC Audit No. CR2004FL008)

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REDACTED - CONFIDENTIAL

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2005, a copy of the foregoing REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY VALUE-ADDED COMMUNICATIONS, INC. in CC Docket 96-45, was served via Overnight Mail to the following:

Universal Service Administrative Company
Internal Audit Division
2000 L Street, Suite 200
Washington, D.C. 20036

Sonja L. Sykes-Minor